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Supreme Court of the United States

OCTOBER TERM, 1950

No. 233

IDA E. STEADMAN, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENTS

BRIEF IN OPPOSITION TO CERTIORARI

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Supreme Court of the United States

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BASIS OF JURISDICTION

The Petitioner, both in her Petition and in her Brief in support thereof, invokes the jurisdiction of this Court under Title 28, Section 1254, paragraph 3 United States Code. We believe that Section 1254 is applicable solely to review by this Court of cases from the Federal Courts of Appeals and that the proper statute applicable in the instant case is Section 1257 of Title 28, the pertinent provisions of which are as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision can be had, may be reviewed by the Supreme Court as follows: * * *
>
> (3) by writ of certiorari, * * * where any title, right, privilege or immunity is specially set up

or claimed under the Constitution * * * of the United States.

In order to obtain review in this Court, Petitioner must also comply with Rule 38 of the Court, the applicable portion of which is as follows:

> 5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a State court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.

PETITIONER HAS WAITED TOO LONG TO SEEK REVIEW IN THIS COURT

This case has been to the South Carolina Supreme Court twice. On its first trip there, that Court reversed the lower's court's conviction on the first count (producing an abortion resulting in death) and remanded the case for a new trial on the second count (producing an abortion). 214 S. C. 1, 51 S. E. (2d) 91. This decision was rendered November 22, 1948, and Petitioner did not seek review in this Court following that decision.

The second trial resulted in a conviction on the second count and the imposition of a penal sentence and a fine. Appeal was again taken to the State Supreme Court, where the judgment was affirmed.

Petitioner now seeks review by this Court, but it is apparent from a reading of the last paragraph of her "summary statement of matter involved", found on page 5 of her Petition, that she is now asking this Court to review the decision of the South Carolina Supreme Court of November

22, 1948, and not the decision of April 12, 1950, which is reported in 216 S. C. 579, 59 S. E. (2d) 168.

We respectfully submit that Petitioner's proper procedure was to seek the review of this Court immediately following the decision of the State Court of last resort in November 1948, and that her present Petition seeking to review that decision after a second trial and conviction and affirmance by the State Supreme Court, comes too late, and should not be considered by this Court.

PETITIONER DID NOT TIMELY PRESENT HER ALLEGED FEDERAL QUESTION IN THE COURT BELOW

The Federal question which Petitioner seeks to establish in her Petition and Brief to this Court was mentioned only briefly and in the most general terms in the trial court. On page 53 of the original Transcript her counsel states:

> We make the additional proposition that the allowing of this indictment to go forward would be in violation of the provisions of the Constitution of South Carolina, which says that a person shall not be put in jeopardy more than one time, and the Constitution of the United States also guarantees that right to a citizen, and we say that the intent, if there is such an intent, of the Supreme Court to limit or circumscribe, or circumvent that particular constitutional inhibition in both Federal and State Constitutions is in violation of law.

Neither the motion for acquittal nor the motion for directed verdict in the trial court mentioned any Federal question.

Petitioner went to the South Carolina Supreme Court from this second conviction on nineteen exceptions. The only one of these exceptions having any remote connection to the

Federal question which she now urges is Exception XVIII, reading as follows:

> That His Honor, the Circuit Judge, erred in refusing to direct a verdict for the defendant on the ground that she has been twice placed in jeopardy and this ruling deprived defendant of her liberty without due process of law.

Petitioner did not argue her present Federal question in her brief to the State Supreme Court, nor did that Court mention it in its opinion. She did argue, and the State Court did dispose of, the applicability of the Federal Communications Act, the Search and Seizure provisions of the Fourth Amendment, and the witness confrontation proviso of the Sixth Amendment. However, her present Petition is not based on any of these, and this Court has held that a Federal question not specially set up or claimed in a State court cannot be considered in this Court merely because another Federal question, not connected with it, was raised in the State court. *Keokuk v. Illinois,* 175 U. S. 626.

She argued Fourteenth Amendment due process and Fifth Amendment double jeopardy for the first time in her Petition for rehearing to the South Carolina Supreme Court. This Petition was denied without opinion. Raising the Federal question at this stage is of no avail to Petitioner in her effort to get this Court to review her case. *Simmerman v. Nebraska,* 116 U. S. 54; *Herndon v. Georgia,* 295 U. S. 441. See *Green Bay Co. v. Patten,* 172 U. S. 58.

NO FEDERAL QUESTION OF SUBSTANCE IS PRESENTED

In her Brief the Petitioner cites the double jeopardy provisions of both the South Carolina and the United States Constitutions. We do not believe that this Court is in any wise concerned with the provisions of the South Carolina

Constitution that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty". As to this proviso, the South Carolina Supreme Court is the final interpreter of the meaning thereof, and that Court has held that the present case does not conflict with this constitutional mandate. 216 S. C. 579, at 589.

Petitioner also argues that the double jeopardy provision of the Fifth Amendment of the United States Constitution should be read into the due process clause of the Fourteenth Amendment so that the identical test as to what is double jeopardy would apply in criminal prosecutions in both State and Federal Courts.

The argument that the due process clause restraint of the Fourteenth Amendment is, as to the States, shorthand for the restraints placed upon the Federal Government by the first eight amendments, is not a new one to this Court. In fact, Petitioner admits on page 17 of her Brief that the case of *Palko v. Connecticut*, 302 U. S. 319, is squarely against her on this point, but she seems to argue that the Court should reexamine and overrule that doctrine.

The *Palko case* was decided in 1937, but this Court as recently as last year has reaffirmed the doctrine there laid down. In *Wolf v. Colorado*, 338 U. S. 25, Mr. Justice Frankfurter, speaking for the majority, said:

> Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, *e. g.*, *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4

S. Ct. 111, 292; *Twining v. New Jersey,* 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14; *Brown v. Mississippi,* 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Palko v. Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *Adamson v. California,* 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223. The issue is closed.

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko v. Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149, *supra.* That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead. In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that Court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty". 302 U. S. at 325.

338 U. S. 26-27.

Petitioner also argues that under the broad implications of the due process clause she is entitled to a reversal of her conviction. She cites *Brown v. Mississippi,* 297 U. S. 278, as an instance where this Court upset the action of a State Court in a case where the accused was denied the aid of counsel. However, in the recent case of *Bute v. Illinois,* 333 U. S. 640, this Court held that the due process clause does not require that counsel be furnished to one charged in a State Court with a crime for which he could receive a

sentence of twenty (20) years. The crime of which the Petitioner in the instant case stands convicted is not a capital one and thus the reasoning of the *Bute case* is more in point. Concerning the meaning of the due process clause, the Court in the latter case said:

> The Fourteenth Amendment, however, does not say that no State shall deprive any person of liberty without following the **Federal** process of law as prescribed for the Federal Courts in comparable Federal cases. It says merely "nor shall any State deprive any person of life, liberty or property without due process of law; * * *" This due process is not an equivalent for the process of The Federal Courts or for the process of any particular State. It has reference rather to a standard of process that may cover many varieties of process that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political situations * * *" *Hebert v. Louisiana, supra.* This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the States for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts. It recognized that differences arise naturally between the procedures in the State Courts and those in the Federal Courts * * * It is the established policy of both the State and Federal Governments to treat possible conflicts between the powers in such a manner as to produce as little conflict and friction as possible. So here the procedure followed by Illinois should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Illinois procedure violates "the very essence of a scheme of ordered liberty" and its continuance would "violate a 'principle of justice so

rooted in the tradition and conscience of our people as to be ranked as fundamental' ". Cardozo, J. in *Palko v. Connecticut,* 302 U. S. 319, 325, 82 L. Ed. 288, 292, 58 Supreme Court 149, with quotation from his opinion in *Snyder v. Massachusetts,* 291 U. S. 97, 105, 78 L. Ed. 674, 677, 54 Supreme Court 330.

333 U. S. at 649-650, 658-659.

Since this Court has decided in the *Palko case, supra,* that the double jeopardy prohibition of the Fifth Amendment is not "implicit in the concept of ordered liberty" and is not, therefore, to be read into the Fourteenth Amendment as a prohibition against the State of South Carolina, Petitioner has failed to show that any Federal question is involved in her application for review.

SOUTH CAROLINA'S POSITION ON THE MERITS IS SOUND

Petitioner cites, on pages 17, 18 and 20 of her Brief, general statements from Corpus Juris Secundum and American Law Reports to the effect that the weight of authority in this country is that in a situation such as hers, where a new trial is obtained, she can be prosecuted only for the crime of which she was found guilty on the first trial and can plead a prior acquittal as to the count or counts on which the jury verdict is silent. However, both of these authorities indicate that there are cases holding the opposite of this rule.

In its opinion of April 12, 1950, 216 S. C. 579, the South Carolina Supreme Court in this case recognized that the South Carolina rule differs from that of some other jurisdictions when it said that:

It is contended that both counts of the indictment were submitted to the jury and that conviction on the

first count implied an acquittal on the second count. In our opinion this contention cannot be sustained under our cases, although the rule is different in some other jurisdictions. A defendant charged with two or more offenses under two or more counts, who by appeal seeks a review of his conviction under one of the counts and obtains a reversal of the conviction, cannot plead former jeopardy upon a new trial granted on the count or counts as to which there was in the former trial an implied acquittal. Our cases fairly hold that a defendant who is convicted on one count and impliedly is acquitted on another, and who appeals and obtains a reversal, can be tried again on all the counts; or on the count on which he was acquitted on the first trial, expressly or impliedly.

216 S. C. 589-590.

The fact that the South Carolina rule may be the minority one in this country is no basis for seeking the review of this Court as to a matter which is the sole concern of the individual states.

Petitioner cites the dissenting opinion of this Court in *Trono v. United States,* 199 U. S. 521, as an example of what the law on this subject ought to be. But she admits that the majority opinion in that case was followed in *Flemister v. United States,* 207 U. S. 372, and that the recent case of *Wade v. Hunter,* 336 U. S. 684, has not liberalized the construction placed on the double jeopardy provision in the earlier cases. *Cf. Bryan v. United States,* 94 L. Ed. Adv. 287.

CONCLUSION

One who seeks review of a State Court judgment in this Court has the burden of establishing the Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649. Petitioner has failed to meet this burden because (1) she did not properly raise her alleged Federal question in the

South Carolina Courts, and (2) the question which she now seeks to raise has been determined adversely to her contention by definitive decisions of this Court. *Certiorari* should be denied.

Respectfully submitted,

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R. HOKE ROBINSON,
Assistant Attorney General.

Columbia, S. C.

OCT 30 1950

CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1950

No. 233

IDA E. STEADMAN, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A RE-HEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA DENIED BY ORDER OF THIS COURT, DATED OCTOBER 16, 1950, AND BRIEF IN SUPPORT THEREOF

IDA E. STEADMAN, PETITIONER.

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CONSTITUTIONAL PROVISIONS

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To the Honorable, the Supreme Court of the United States:

The petition of your petitioner, Ida E. Steadman would respectfully show unto the Court:

A. Summary statement of matter involved.

This is a petition for a re-hearing of the petition for a writ of Certiorari directed to the Supreme Court of South Carolina to review a judgment of that Court in this case

filed on April 12, 1950, Case No. 3167, Opinion No. 16339, previously filed in this Court, which petition was denied by order of this Court, October 16, 1950.

This petition is filed pursuant to the provisions of Rule 33 of this Court as amended.

There is only one material fact which petitioner desires the Court to consider in addition to the facts as set out in petitioners original Petition, *i. e.*, the concurring opinion of Mr. Justice Oxner, concurred in by Mr. Justice Fishburne and Mr. Justice Stukes in the first appeal, *State v. Steadman*, 51 S. E. (2d) 91, 214 S. C. 1, in which the Supreme Court of South Carolina reversed the judgment of conviction against petitioner upon the first count and remanded the case to the trial Court with direction that the petitioner be tried upon the second count contained in the indictment although no question as to the second count was contained in the record and petitioner was presented no opportunity to be heard upon that issue.

The concurring opinion is as follows:

"Oxner, Justice (concurring):

"I am in full accord with the opinion of the Court but think that we should state more definitely what further action may be taken in the Court below.

"Where there are several counts in an indictment charging separate offenses, a verdict of guilty upon one count ordinarily. amounts to an acquittal upon the remaining counts concerning which the Verdict is silent, but this general rule does not apply to the situation before us.

"When the jury found appellant guilty of violating Section 1112, that body necessarily concluded that the State had established all the elements essential to a conviction under Section 1113.

"Stated differently, a verdict of guilty on the first count would be entirely inconsistent with a verdict of

acquittal on the second count. There is no basis to support an inference of an implied acquittal on count two from a verdict of guilty on count one. Accordingly, I think the case should be remanded for new trial on count two of the indictment.

"The opinion of the Chief Justice leaves the question of whether appellant may again be tried on count two undetermined. It is true that the effect of a reversal for insufficiency of the evidence as to count one has not been discussed by counsel but it necessarily arises in determining the nature of our mandate and I think the orderly administration of justice requires that the question now be settled.

"This opinion having now been concurred in by two other members of the Court, the case is remanded for a new trial on count two of the indictment.

"Fishburne and Stukes, J. J., concur."

When the petitioner moved to quash the indictment, as to the second count at the second trial out of which the present conviction was had, the Trial Judge felt bound by the "Mandate" contained in the concurring opinion hereinbefore set out and therefore overruled petitioners motion to quash the indictment, based upon the plea of former jeopardy. It is only fair to assume that, but for the "Mandate" contained in the concurring opinion the Trial Judge would have granted the motion to quash and the petitioner would not have been placed in jeopardy twice for the same offense.

There was no question presented by the record upon the first appeal involving in any way the second count. It therefore follows as a matter of course, that any action which the Court sought to take involving the second count, was void and a nullity because such action was in excess of the jurisdiction of the Court. For that reason petitioner submits, that she has been denied the due process of law guaranteed her by the Fourteenth Amendment to the United States Constitution, for petition has been tried and

convicted under a void order court without having been given a right to be heard in opposition to that order.

B. Basis of the Courts Jurisdiction.

It is competent for this Court to require by Certiorari that this case be certified to it for determination pursuant to Act of June 25, 1948, c. 62 Stat. 929 Title 28, Sec. 1254, par. (3) United States Code Annotated; and Rule 33 of this Court as amended.

C. Questions presented.

Did the Supreme Court of the State of South Carolina in refusing to reverse the verdict and judgment of the Trial Court and in refusing to enter judgment for the petitioner on the ground that petitioner had been denied the due process of law guaranteed to her by the Fourteenth Amendment to the United States Constitution by being tried and convicted under a void order of court contained in a concurring opinion upon a question of law that petitioner was not permitted to be heard upon?

D. Reason relied upon for the allowance of the writ.

With respect to the question here presented, the Supreme Court of the State of South Carolina rendered a decision in violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States which guarantees to all American Citizens due process of law by affirming petitioner's conviction which was had under a void order of the Supreme Court of South Carolina.

Supreme Court of the United States

OCTOBER TERM, 1950

No. 233

IDA E. STEADMAN, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN SUPPORT OF CERTIORARI ERROR TO BE URGED

The Supreme Court of the State of South Carolina, erred in affirming the judgment of the Trial Court, in refusing the petitioner's motion to quash the second count in the indictment made upon the ground, that petitioner should not be placed in jeopardy twice for a single offense and based such ruling upon a void order of the Supreme Court which was passed without opportunity to petitioner to be heard, thereabout, which deprived petitioner of due process of law guaranteed to her by the Fourteenth Amendment.

Summary of Argument

The petitioner contends The South Carolina Supreme Court in sustaining the trial judge's refusal to quash the indictment acted upon a void order of the Supreme Court in doing so, thereby deprived petitioner of due process of law as guaranteed to her by the Fourteenth Amendment to the United States Constitution.

ARGUMENT

At the first trial the petitioner was tried upon and indictment containing two counts. She was convicted of violation of the law under the first count.

The conviction under the first count was appealed to the South Carolina Supreme Court. That Court in a unanimous opinion reversed the conviction.

In a concurring opinion signed by three of the five justice's it was ordered that the case be remanded and that petitioner be tried upon the second count. The second count in the indictment was in no wise involved in the appeal, the question as to whether or not petitioner should be tried upon the second count of the indictment was not argued or presented to the Court, but the Court by a three to two decision did decide that question without giving petitioner a right to present her side. It was a usurpation of jurisdiction that the Court did not have and was consequently void.

At 15 Ruling case Law, page 604, the Authors set forth the rule as follows:

> "A judgment will be void which is a departure from the pleadings (record), and based upon a case not averred therein, since if allowed to stand it would be altogether arbitrary and unjust and conclude a point upon which the parties had not been heard."

The Authors of that same work at Volume 15, page 853 state the Rule in this language:

> "While it is well settled that a judgment cannot be questioned collaterally for an error, committed in the exercise of jurisdiction, the rule is equally well established that a judgment may be attacked in a collateral proceeding for jurisdiction. Even where a court has jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. Thus, a judgment may be collaterally attacked where the Court had jurisdiction of the parties and subject-matter of the action, but did not have jurisdiction of the question which the judgment assumes to determine."

Under the forgoing rules the action of the South Carolina Supreme Court in passing upon the second count of the indictment, which was not before the Court, was a usurpation of jurisdiction by the court and consequently void. And, further it was a deprivation of petitioner's right to a day in the court and also a deprivation of due process of law guaranteed to petitioner.

And, when the South Carolina Supreme Court affirmed the trial judge for following a void order in refusing to quash the indictment upon the second count in the indictment, the Supreme Court again denied to petitioner the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

At this point we digress for a moment to call the Courts Attention to the fact that in the first appeal the decision with reference to the second count of the indictment was by a divided court, three to two, on the second appeal the judgment affirming petitioner's conviction was decided by a divided count, three to two, and lastly upon petition to

the South Carolina Supreme Court for a re-hearing the order was by a divided court, three to two.

In conclusion, petitioner earnestly submits that she has been deprived of her rights under the Fourteenth Amendment to the United States Constitution.

On that basis petitioner submits this petition.

IDA E. STEADMAN,
PETITIONER.

CERTIFICATE

I, Ida E. Steadman, hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that the petition is restricted to the grounds therein specified.

IDA E. STEADMAN,
PETITIONER.

ACCEPTANCE OF SERVICE

We hereby acknowledge service of the foregoing Petition for Re-hearing of Petition for Writ of Certiorari to the South Carolina Supreme Court this ..... day of October, 1950.

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